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THE SPEECH OF

Sir *Audley Mervyn* Knight;

His Majesties Prime Serjeant at Law,

And Speaker of the House of Commons in *Ireland*.

Delivered to His Grace JAMES *Duke of* Ormond, *Lord Lieutenant of* Ireland, *the* 13 *day of* February, 1661. *in the Presence-Chamber in the Castle of* Dublin.

Containing the Sum of Affairs in *Ireland*; But more especially, the Interest of ADVENTURERS and SOULDIERS.

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The SPEECH *of Sir* AUDLEY MERVYN Knight, *His Majesties Prime Serjeant at Law, and Speaker of the House of* COMMONS *in* Ireland: *Delivered to* JAMES *Duke of* ORMOND, *Lord Lieutenant of* Ireland, *the* 13 *day of* February, 1662. *in the Presence Chamber in the Castle of* Dublin.

May it please your Grace;

ACcording to the ancient Priviledges of our House, We have been humble Suitors for this Access into the Royal Presence: and your private Spirit which knows not how to deny, prevails so in your publick Capacity, that even for this your Graces particular condiscention, I am commanded by the Knights, Citizens, and Burgesses in Parliament assembled, to present you their most Submissive acknowledgment.

And surely this present Solemnity of the House attending your Grace, may carry the signification of a Hand in the Margent, to point out something more then of ordinary observation.

This, with us, is as a sheet-Anchor, which is never made ready but when we discern a cloud; perchance it is yet no bigger than a mans Hand, but by the best Judgment we can make of it, it is like to over-cast the Horizon of this Kingdom; This makes this Address of that Importance, that the House thought not fit to entrust it to the bare expressions of a Speaker, (had he been of the greatest abilities,) therefore have they committed it to this Instrument, that it might remain as a Record of their Endeavours, that the hard Fate and Ruine of an English Interest in this Kingdome might not bear date under the best of Kings, under so vigilant a Lord Lieutenant, under the first (and if not prevented, like to be the last) Protestant Parliament that ever sate in this Kingdome.

It would confound Astrologers to observe such Planets, such masculine Planets, ascending, in Conjunction, in the Houses of their Exaltation, and yet this Kingdom not to be Planet-struck.

There is a time to ſpeak, and a time to hold our peace; This, this, is the Critical time, God calls us to it, when Religion, the eſtabliſht Religion is in danger to be undermined, by caſting the predominancy of temper upon a Popiſh Intereſt: And believe it Sir, whatſoever deluſive Tenents have been broached a late, the contrary hath been written in Letters of bloud, not in his Majeſties Kingdoms onely, but whereſoever the Papal power was exalted; That perſons profeſſing the Reformed Religion, are but Tenants at Will for their Lives and Fortunes, and through Centuries of Ages it appears, That as their Fleeces grow they are ſhorn, till a time of ſlaughter be appointed.

His Majeſty, He hath called us by his Writ to no other end, but to offer up our humble Advice, *Ne quid detrimenti reſpublica capiat*; And if ever the advice of Subjects may be ſerviceable to their Prince, this is the time, when this poor, miſerable, and unfortunate Kingdom, fruitful by the bloud of Engliſh, and plac't as a greedy grave to bury their treaſure in from age to age, is upon its new module: It is now in its Mintage, and our care muſt be, that the Miter be not ſtampt inſtead of the Crown; It is not long ſince the ſale of this Kingdom was offered to the Miter, as his Majeſties Intereſt was proſtituted to every Roman Catholick power, ſo that it may be ſaid of *Ireland*, as *Jugurtha* ſaid of *Rome*, *O venalem Hiberniam, mox perituram ſi modò emptorem invenerit*: Did I ſay his Majeſty call'd Us? May his Majeſties days be long, and proſperous; Were we weltring in our bloud, We muſt hold water whileſt he waſhes his Hands in Innocency.

The Country calls Us, and were they not aſſured We would ſpeak for them, doubtleſs but your Grace had heard them ſpeak for themſelves by their humble Petitions, for the Alarum, that *Hannibal* is at the Gates, is not throughout the Proteſtant Plantations; We are his Majeſties Great Council, the grand Inqueſt of the Kingdom, and We dare appeal to your Grace, how We have ſpent our time: We underſtand the uſual proceedings in Parliaments, to begin at Grievances, and conclude with Supplies; We have inverted the Order, and applyed our ſelves hitherto in ſettling a conſtant Revenue for his Majeſty, and granting other Temporary ayds far above our abilities, yet far leſs then what his Majeſties goodneſs may challenge from us: There hath been an imitable contention, as I may ſay, between the King and his Parliament here, if it were poſſible for a Subjects to out-do ſuch a King, We would; but 'tis poſſible for a King, and he hath out-done us, and therefore *vah illis*, Wo be to them, that in this Conjunction would undo us both.

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It must be therefore a forc't Put, that presseth us on to this address and our moderation even in it will appear; *Cuncta prius tentanda.*

It is in the body Politique as it is in the natural, the brawny and fleshy members can admit a discontinuity of parts, though not without pain, yet without danger: But the apple of the eye is so tender, that the least dust is offensive to it: We enjoy the benefit of many good and wholsom Laws, But the Act of Settlement is the Law of Laws, it is the *Magna Charta Hiberniæ*, this is the apple of the eye, and must be Printed with this Motto: *Nemo me impune lacessit*: Our strength lies in this, as *Sampsons* in his locks; if those be cut, we are as weak as others, when the Philistins, shall fall upon us, in the execution of other Laws, whether *Mint* and *Cummin*, in this we fulfill the weightyer things of the Law.

Your Grace well remembers that strugling twins in the Womb of this Act, never Prince that sat upon the Throne, encured so many pangs and throws, to give his Protestant Subjects a Birth and Life, as CHARLES the Second did: And We shall never forget the fainting expectations of the People for this Bill of Settlement, when every ones Soul look't out at the Casements of his eyes, as *Sicera's* mother, with a *Why are the wheels of his Chariot so long a coming?* But now Sir, with as great a sorrow We behold the driving of the Chariot to belike the driving of *Jehu* the Son of *Nemish* that drove furiously.

We come not this day to reflect upon the Commissions for executing the said Act: This House hath a great respect for that Court, it had part of our breath to give it life, and we are under the greatest obligations to admire his Majesties goodness and favour to his Protestants, (I shall never forget the expression of his Majesty at a full Council,) my Justice I must afford to you all, but my favour must be plac't upon my Protestant Subjects, in sending over those Gentlemen, that were of our own Countrey and Religion: His Majesty warrantably judged, that if difference were betwixt an Israelite and Egyptian, *Moses*, would lean to the Israelite: His Majesty knew men of resolution might alter the Climate without changing sound Principles, though even those may be indanger'd by a constant and familiar conversation, with persons of different judgements: and so we may in time forget to attest the fear of *Abraham*, and learn to swear by the life of *Pharaoh*; We consider the comprehensiveness of the Act, their new beaten path of proceedings, *sæpe viatori nova: non vetus orbita fallit*; The mixture in Hotch pot of Law and equity,

ſo that they are both Jurors and Judges, and the ſummainefs of the proceedings they deſigne, ſo that the Text many times may happen not to be the Rule, but the Hower-Glaſs; His Majeſties other Courts ſhoot from a reſt to a dead mark, and ſildom or never miſs; This Court runs and ſhoots at a flying mark, and therefore it is admirable if it ever hit aright. I ſay Sir, We come not to criminate, or to force a ball into the Dedan, but if any brick-wall expreſſions happen, that cannot be deſigned otherwiſe, it is rather a force upon us.

Upon the whole, the Knights, Citizens, and Burgeſſes, upon the ſerious obſervations they have made of the proceedings of that Court, have made this judgment, That without ſome ſpeedy Rules and Inſtructions be given to thoſe Gentlemen, as the line and plumm to direct the executive part of that great Act of Settlement, that the Lands juſtly forfeited to His Majeſtie, upon the account of that late horrid and unnaturall Rebellion in this Kingdom, and by His Majeſtie freely granted to the Engliſh (to improve and enrich, which they have beggard themſelves) will be taken out of their poſſeſſion, and themſelves, wives and children expoſed to mockery and miſery; and actual Rebels that yet ſurvive, or the Heirs and Blood of thoſe that died active in that Rebellion, be reſtored to the ſame; and this being all done under pretence of ſevere juſtice, the Roman Catholicks of this Kingdom, may get a reputation and credit to thoſe pamphlets they have diſperſt through *Europe*, That His Majties Proteſtant Subjects firſt fell upon and murthered them. Sir, the Commons cannot but be apprehenſive of theſe conſequenſes, and therefore in this Inſtrument, have drawn certain propoſals by way of humble advice tendred to your Grace, in the name of the Commons of this Kingdom: They are not of the nature to impoſe any forraign ſenſe upon the Act, they ariſe out of the bowels of it; they ſeek not to lay out a new way, but only where ſome corners and deſtowers are, to hang out lights; and the greateſt Courts of Judicature will put out ſnuffs, when to read the Statute, they may have a Parliament-light, eſpecially a light held by that Parliament that paſt the Act: They have likewiſe their convoy to your Grace by a particular clauſe in the act requiring the Commiſſioners to give an account to your Grace and the Council, of their proceedings, to and follow ſuch further directions as they ſhall from time to time receive from your Grace and Council perſuant to the Act.

I shall crave your Grace's leave and patience to read it in distinct Paragraphs, and according to the commands of the House, to hint some parts of their sense, for the reasonableness of them.

Forasmuch as by the Act of Settlement, there is a power vestd in His Grace the Lord Lieutenant and Councel, to give further Directions and Rules from time to time, to the Commissioners for executing the said Act; and forasmuch as it evidently appears to the House of Commons, That there is a necessity of severeal Rules and Directions to be given the said Commissioners, therefore the following particulars are to be offered to the consideration of his Grace the Lord Lieutenant and Councell, as the humble advice of the said House in order thereunto.

This, though it sounds as a preamble or introduction, and so may be lookt on as a Frontice-piece or Title-page by some; yet by us is understood as an essential part of the structure: If our distractions were doubled, they could not divide us in our duty. *Nec natura aut Lex operantur per saltum*; you were not onely the neareſt port, but *Statio bene fida carinis*: And though the night should grow dark, and tempestuous upon us, your care hath hitherto been as a Beacon upon a high Promontory, not only burning upon the arrival of a Fleet (such as this Addresse is) but even to secure the least Fisher-boat, the smalleſt and individual interest, when it lays its course to you: Suyreme Councils, and General Assemblies, have, upon created or imaginary necessities, gone to the Witch of *Endor* and having taken their observations from their own *Ignes fatui*, instead of the Guards of *Charles* his Wain, have arrived at *Tyber* instead of *Thames*: Now, Sir, being in our right Port, we shall break Bulk; and the first Proposal is this:

1. *That the King be by the Court of Claims allowed to be Party, as by Law he ought to be; and that no cause be brought to Adjudication, till the Attorny General have a fair Summons, and be fully heard.*

Your Grace might think us under some distemper to offer this; for *utrum nix sit alba, non est disputandum*: But if the Commissioners have declared in Court, That His Majestie is not concerned, and have, before judgment given, refused to admit evidence upon record, offered by Mr. Attorny-General in His Majesties behalf, pregnant with evidence

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to have proved the Nocency of the person, and thereupon have declared the Nocent, Innocent, and in a breath blown down the Title of several Protestants, and their respective Heirs, their improvements, and the like, it is the Duty of Us sitting in Parliament, judiciously having taken cognizance thereof, to offer some Expedient against it. Sir, *Innocent*, or *Nocent*, is the Question, which without any help of a *Septuagint*, is translated at the Barr of the Kings-Bench, *Are you guilty of the general Rebellion of* Ireland, *or not? Stamf. pl. Cor.* 1. I wonder if they will not infer this, *inter placita Coronæ*: Then under what Title would they refer it? If the Commissioners be pleased to consult their Oath prescribed by the Act, it is thus: *Act. p.* 59.

YOu shall swear, That you shall to the best of your skill, truly and impartially administer Justice between his Majesty and the Subject, and between party and parties, in the place of a Commissioner, for putting in execution His Majesties gracious Declaration and Instructions for the Settlement of Ireland, *according to an Act intituled*, An Act, &c.

This Oath is framed *in terminis*, according to the exigency of the subject matter cognizable in every Claim by the Commissioners; for every Claim, Guilty, or Not guilty of the Rebellion, is one part, and hath hitherto been first tryed by them; and to this part, the Oath provides in these words, *You shall truly administer Justice between his Majesty and the Subject*: Then admit the person be adjudged Innocent, yet the English-Adventurer or Souldier, in case such Innocent's Title to the Land be not good, is in by the Act; and then in the second place, the Title comes in question, and for this the Oath is suited, *viz. And betwixt party and party.*

Regularly, either by Office or Attainder, forfeited-Lands are vested in the King, and his Majesty being graciously pleased not to proceed by the severity of Attainder, which reacheth life and corruption of bloud on the one hand, nor the expence and delatorines of Offices to be found, (not consisting with a Kingdome gasping for a Settlement) was pleased to rest his Title upon a Tryal of Innocency: So that, exclude his Majesty to be party, the Commissioners Judgments cuts both ways: The Irish are turned out of their Inheritances upon the account of Treason, and the King not party, the English shall have their Lands, and yet they were never legally settled in the King; so that Treason will seem to be a crime

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not so much against the King, as against the Subject; Lands by the Act, are vested in his Majesty, so they be not the Lands of Innocent persons, (and Qualifications for the tryal of their Innocency are positive.) Lands are given to the Adventurers and Souldiers, if they belong not to Innocents, where rests the Freehold, in the Innocent persons? That is but conditional and contingent; Is it in the Adventurer or Souldier? that is but conditional and contingent; Is it in the King? it is there but conditional and contingent: Why then it is in *custodia legis*, to judge between these three persons; the Innocent can never have it if it be judged for the King, the English can never have it, except it be judged for the King: then to exclude the King is in construction of Law, to exclude the English; for the Commissioners Decree cannot give the Land to the English, except the Act and Law warrant it, but nothing by Law can pass from the King, till it be first in him, and there is no way by the Act to place it in the King, but by the judgment of the Court, betwixt the King and the pretending Innocent.

Courts of Justice, *ex Officio*, if a title upon the pleadings arise for the King, are to take notice of it and improve it, though the King be not party to the Action. *Hob.* 126. 127.

The Court will award a Writ for the King where the Title appears for Him on the Verdict, though the Issue find it not for him. *Hob.* 118, 119.

And where Statutes are made to put things in an Ordinary form, and authorize inferiour persons for the execution of it for the ease of Soveraign power, or the ease of the Subject, yet they shall never restrain the Soveraign power or Interest. *Dyer*, 225. *part* 35. *Hob.* 146.

Besides, this Act is a general Act as to this; nay, it is rather *Statutum generalissimum*. It concerns the King in giving and taking, which are relatives, and the Honour and Justice of the King in performing really the intents of his Grants doth as much concern Him and His People, as doth His profit in enjoying and receiving Grants from them, (they are the words of a reverend Judge, the Lord *Hobbart*, whose spirit in the behalf and interest of the King; I would propose as imitable and exemplary to the Commissioners, I shall not set a syllable of his own expression, (the Case is *Sheffield* versus *Ratcliffe*. *Hob*, 335.) (viz.) *I must profess*, that whensoever I have thought of this Case, and advised upon it my self, *I have met* with two strong affections, Zeal and Indignation, Zeal in behalf of the King, *to preserve* the ancient right of the Crown, against the invasions of *Rebells* and *Traitors*; Indignation when I find

Francis Bigod, that ſometimes brought a *puiſſant* Army into the Field, to depoſe the King; failing in that enterpriſe, now to riſe *up in judgement* againſt him: that whom he could not by the Sword deſtroy, he *might ſupplant* by the Law: For though *Ratcliff* bear the name of this Caſe, *yet I ſee* nothing, but the Land of *Francis Bigod*, his State, his Right, and Title, *his bloud*, his diſcent that maintain and defends it: Therefore let it not ſeem ſtrange, that *I am warm* in this Caſe, for Zeal and Indignation are fervent Paſſions: And *I do profeſs*, to give Prerogative to the right of the Crown in my care and vigilancy; and it is *nobile officium Judiciis & debitum*, due by Oath and Office to watch for him, who *wakes* for us, *Ne quid detrimenti Reſpublica capiat*: And if Charity begin at it ſelf, *ſo ought* Juſtice to do, that the King, who granteth Juſtice to all, ſhould not be wanting to himſelf, *&c.*

Sir, This needs not by an Application to be ſhaken together, it mingles with the preſent purpoſe, as water doth with water; I ſhall onely obſerve, that the breath of this Reverend Judge perfumes the preſence Chamber: whatſoever is contrary in the like Caſe, is like the ſtench of *Mare mortuum*, that ſtifles whatſoever approaches it. This *Francis Bigod* was attainted and executed, 28 *H.* 8. And this zealous expreſſion was 13 *Jacobi*, by computation ſomething longer then from the 23 *Octob.* 41. to 1662. *Bigod* is reſolved into his firſt duſt, and thoſe dormitories have ſome priviledge, *De mortuis nil niſi bonum*, when the perſons with whom the preſent Iſſue is to be joyned, are living, *vivit, imò vivit, etiam in ſenatum venit*; The Queen 24. of her Raign, granted the ſame Lands to *Edmond* Lord *Sheffield*, and the Reverend Judge, and the Court retreated not to the Objection made by our Commiſſioners, That the King had parted with the Lands from himſelf, and ſo in a manner *qui poteſt capere capiat*, thereby to render that great Act of Settlement, the Emanation of his Majeſties Royal Bounty, to be diſpenc't by a Rule of Juſtice, to ſeem rather like a muſs of Apples or Nuts thrown in the Streets, to invite Boys to ſcramble.

Before I leave this Point, I ſhall crave leave to intimate to your Grace's remembrance, (for truly if I ſhould ſeek in this Point to inform your judgment, I were under an unpardonable guilt,) the opinion of his late Majeſty of ever bleſſed memory, how far he concerned himſelf, and the diſpenſation of his Juſtice, in order to the Settlement of this Kingdom intereſted: In his Majeſties Speech delivered to both Houſes 14 *Dec.* 41. there is this expreſſion: But ſtill ſeeing the ſlow pro-

Exact Collection.

proceedings therein, and the daily disparities I have out of *Ireland*, of the lamentable estate of my Protestant Subjects there, I cannot but again earnestly recommend the dispatch of that expedition unto you; for it is the chiefest business that at this time I take to heart, and there cannot (almost) be any business, that I can have more care of: I might now take up some of your time in expressing my detestation of Rebellions, in general, and of this in particular; To conclude, I conjure you by all that is, or can be dear to you and me, that laying away all Disputes, you go on chearfully, and speedily, for the reducing of *Ireland*.

In his Majesties answer to a Petition of the Parliament, his Majesty delivereth himself thus: We cannot but thank you for this care, and your chearful ingagement for the suppression of that Rebellion, upon the speedy effecting whereof, *The Glory of God* in the Protestant Profession, the safety of the Brittish there, our Honour, and that of this Nation, so much depends; all the Interests of this Kingdom, being so involved in that business, *&c.*

exact. collect. p. 34.

In his Majesties Declaration to all his loving Subjects, publisht with the advice of his privy Council, it is thus declared: *viz. And our hope is, that not onely the Loyalty and good affections of all our loving Subjects will concur with us in the constant preserving a good understanding betwixt Us and our People; but at this time, their own and our Interest, and lamentable condition of our poor Protestant Subjects in* Ireland, *will invite them to a fair intelligence and unity amongst themselves, that so we may with one heart intend the relieving and recovering that unhappy Kingdom, where those barbarous Rebels practice such inhumanities, and unheard of outrages, upon our miserable People, that no Christian ear can hear without horrour, nor Story parallel*; And a few lines after follows these words, (*viz.*) *Whereas We acknowledge it a high Crime against Almighty God, and inexcusable to our good Subjects of our three Kingdoms, if we did not to the utmost imploy all our powers and faculties to the speediest and most effectual assistance and protection of that distressed People: And we shall now conjure all our good Subjects, (of what degree soever) by all the bonds of love, duty, and obedience, that are precious to good men, to join with us for the recovery of the Peace of that Kingdom*, &c.

In His Majesties Message, sent by the Lord Chamberlain to the House of Peers, it is thus said: *His Majesty being very sensible of the great miseries and distresses of His Subjects in the Kingdom of* Ireland, *which do daily increase so fast, and the bloud which hath been already spilt by the bar-*

barousness and cruelty of those Rebels crying out so loud, &c. And in his Proclamation of the 1. of *Jan.* 41. *inter cætera*; *We have authorized* Exact Coll. 34. *our Justices of* Ireland, *and other our chief Governours or Governours and General, or Lieutenant General of our Army there, and do hereby accordingly, require and authorize them, and every of them, to prosecute the said Rebels and Traytors with Fire and Sword, as persons who by their high Disloyalty against Us their lawful and undoubted King and Sovereign, have made themselves unworthy of any Mercy or Favour, &c.*

In an answer of his Majesties, are these words, *viz. His Majesty being more tender in that particular which hath reference to* Ireland, *as being most assured, that he hath been, and is from his Soul resolved, to discharge his duty (which God will require at his hands) for the relief of his poor Protestant Subjects there, and the* utter rooting out *of that Rebellion.* Exact Collect. 72. Thus far this glorious Martyr; and these are but few of many.

But Sir, If any shall object, To what purpose serves this? A Rebellion is not disputed, neither is there any that ever questioned His Majesties abhorrence of it. I answer, Though several Pamphlets swarm, to fasten the rice of the Rebellion upon the Protestants, and that we drew the first blood, and much of the like stuff: yet these places are not quoted to that purpose, it is but to shew how unreasonably His Majesty is denied to be a party in discovering who were guilty of that Rebellion, so horrid and odious to all Christians, to use His Majesties words in another place, *Exact Collect.* 71. when especially this very tryal of Innocency and Nocency, is the onely way prescribed by the Act to vest the Lands in the King, and is to supply the defect of Attainder and Offices to be found, which must be in the Kings name; or that any Commissioners can strain the Act and Qualifications, to let Nocency be shrouded under Innocency, and Treason to become merit. Besides, it is to be observed, the Actors, Abettors, *&c.* of the Rebellion in *Ireland*, notwithstanding this jubilee of Indulgences under our gracious Sovereign, stands yet unpardoned, the punishment being left to the execution of this Act; and shall the King be excluded in the tryal, and not made party? I shall say no more, but certainly those that are of that opinion, differ much in judgement from his late Majesty, and his Majesty that now is, who inherits his Fathers Vertues with his Throne: Besides, I shall put your Grace in minde, that the Agents of the Roman confederate Catholicks

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of *Ireland*, amongſt other their deſires in writing, deſired that his Majeſties Council at Law, might be at large, and indifferent; but it would not be granted.

I ſhall further offer the judgement of the Parliament in *England*, *Decemb.* 41. in their third Propoſal to his Majeſty, *viz.*

That you would be pleaſed to forbear to alienate any of the forfeited and eſcheated Lands in Ireland *which ſhall accrew to your Crown, by reaſon of this Rebellion, that out of them the Crown may be better ſupported, and ſome ſatisfaction made to your Subjects of this Kingdom, for the great expences they are like to undergo in that War.* Exact Collect. 2.

I do not infer, that his Majeſties neceſſities or Revenues muſt be ſupplied or ſetled by the confiſcation of innocent perſons Eſtates; God forbid we ſhould put that leavon into the Kings Treaſury, or ſuch Mandrakes into the pot: But Sir, God forbid on the other ſide, that Nocents, Nocents in ſo high a degree, ſhould for want of evidence, that the Law allows in the Kings behalf, ſhould be made Innocents, whereby his Majeſties Revenue ſo conſiderately ſetled in this Kingdom, ſhould be reduced to nothing; and ſo the Protection we enjoy by his Majeſties Army (for ſo is our condition in this Kingdom) be diſſolved, and to compleat the miſery, the Proteſtant Families turnd out to the open Sky, to entertain him, whom upon the accompt of Rebellion, his Sword had conquered. It is further worthy of conſideration, that his Majeſty is not onely concerned in his Revenue, but by a ſtrict decreeing of juſt forfeitures, anſwers a debt his Majeſty hath been pleaſed to take upon himſelf, by his Letters from *Breda*, to the Army here under the Command of the Duke of *Albermarl*: The payment of that part of the Army in *England*, drew vaſt Treaſures, whileſt the forfeited Lands here, by a due execution of the Act, will diſcharge that debt: Be pleaſed to conſider the worthy Adventurers of *England* (of which intereſt, ſaith his late Majeſty, *I am reſolved to be very tender*) and I am ſure, Sir, it concerns a Proteſtant Parliament to be tender of them: Should our ſins provoke God to viſit us with ſo ſharp a correction again, as he did in 1641. with what confidence could we expect ſupplies from *England*, if former Adventurers, bottomed upon ſo ſtrong a ſecurity, ſhould after ſuch ſo long, ſo expenſive ſolicitations, be diſappointed. And Sir, we are upon the precipices of this ruine, when amongſt all the perſons that have been reſtored as Innocents, we cannot underſtand of one, neither

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can We ſay upon our own knowledge (and we come from all parts of the Kingdom) that any one of them, from 1641. to *Sep.*165-- ever drew a Sword againſt the Iriſh in Rebellion, or ever aſſiſted the Engliſh forces in the proſecution of them: And much of this ariſeth, the *King* being not made party, by the vilifying of the Witneſſes produc'd by the Engliſh, the checking of the Engliſh Council at the Bar, whileſt the inſolencies of the Iriſh Counſel are paſt over in ſilence, the diſreſpect unto Depoſitions, Evidences, and the abſolute rejecting of other matters of Record, His *Majeſty* we hope by your Grace and Council, being thus ſtated in his right: we come to the ſecond Propoſal, his Evidence.

2. *That all Examinations and Depoſitions whatſoever, taken for diſcovery of the Rebellion, as proceedings of the Rebels and their Adherents, as well during his late Majeſties reign, or in the time of the uſurped Authority. All Books, Rolls and Writings, remaining in any Offices belonging to the Court of Claims, or in any of his Majeſties Courts of Record, as alſo the Books of* Kilkenny, *be taken for good evidence, in behalf of his Majeſty, to bar ſuch perſon or perſons of their Innocency.*

Sir, We promiſe the King to be party, and then this Propoſal reacheth but to evidence concerning Guilty or not Guilty of the Rebellion in *Ireland*; But in the general, as to evidences and proofs. We muſt take notice that the Law diſtinguiſheth times, and according to Emergencies, ſuits and applyes its remedies; This is the great deſign of the Statute-Law, to alter and change the garments of the Law, according as the dimenſions of the Body Politique alter and change; The Notoriety of this Rebellion no Hiſtory can parallel, (to uſe his late *Majeſties* words) and yet to come to the proof of individual perſons acting in it, is no eaſie matter. In the late Wars between *France* and *Spain*, puiſſant and numerous Armies have been drawn into the field, and yet how few individual perſons by exact proof of the adverſe party, could be concluded to have ever been preſent at any of thoſe battels? Our Caſe differs not; We were as diſtinct enemies as *French* and *Spaniard*, the *Engliſh* under his *Majeſties* Government, the *Iriſh* under a Supreme Councel, and general Aſſembly. How can we witneſs without ſeeing? how could we ſee without fighting? during which Act, Our ſpirits on both ſides exerciſed not ſo much the reflect Act what We ſhould do hereafter before the Judge,

as

as the direct Act, What we were to do upon the place before our General.

Silent leges inter arma, was never more truly applicable, did our present condition bear analogy with Nets and Routs in time of peace, the Law enabled us by means to maintain a distinct proof: But Sir, It is a true Maxim, *Quod remedio destituitur, ipsa re valet si culpa absit.* and the Law where the subject matter in demand will not admit of proof, will supply it, denying to deliver the money, the Law will conster it a sufficient proof to maintain a conversion of it; And the great Act of Settlement had in its prospect these difficulties, the *Act* words (p. 4.) are *viz. And forasmuch as the Rapines Depradations & Massacres, committed by the said Irish and Popish Rebels and Enemies, are not onely well known to this present Parliament, but are notorious to the whole World,* Notwithstanding *the many* Means *and* Artiffices, *which for many years together have been used, to murther such Witnesses, suppress such Evidences, and also to* Vitiate *and* Imbesil *such Records and Testimonies as might prove the same against particular persons,* &c. Thus your Grace observes the Judgment of King and Parliament, that this is an extraordinary Case, and it is not disagreeable to Law, *Novis injuriis emersis nova apponere remedia*, and We ought not to allow that imperfection in our Law (living in the most glorious Constitution in the known World,) that Treason and Rebellion should pass with impunity; because though the Law meets with these Enemies, *per se*, yet that it should suffer them to escape, nay, to triumph, *per accidens*; No Sir, the Law will do much, *ne curia Domini Regis deficiat in justitia.*

2 *Bulstr.* 310.

But Sir, more particularly; The Law betwixt party and party, allows in many cases, Examination to be taken, *in perpetuam rei memoriam*; If so, it would be a hard consequence of his Majesties and Council, fore-seeing the difficulty of proofs, *flagrante bello*, should authorize persons to receive Examinations that then might be had, if afterwards no use should be made of them; It is as true, that *Rex non præcipit inutilia*, as that *Lex non præcipit inutilia*; It is a remarkable Case of Sir *Randolph Crew* (ver. *George Vernon*:) That Examinations of Witnesses taken by Commission, after the death of K. *James*, (which Commission legally was determined,) yet should be allowed to be goods especially (as the words of the Judges are) in a Court of Equity, where the proceedings are *jure naturali*, and not according to the strict course of the Law; And be pleased to observe their further Reason certified to his Majesty, (*viz.*)

Cro. Car. 69, 70.

(*viz.*) Otherwiſe it would draw into queſtion many tryals by verdicts of *Niſi prius*, and Tryals and Attainders upon Goal-deliveries, whereupon divers have been arraigned and executed ſince the Kings death: ſo that your Grace may obſerve the prudence of the Law, to obviate inconveniencies, and therefore *multa conceduntur per obliquum quæ non conceduntur in directo.*

Beſides, the Law requires not the attending of circumſtances ſo præciſe from matters given in evidence, as it doth from the ſame matters by way of pleading; A man ſhall not plead a Record except it be in the ſame Court where it remains, unleſs it be exemplified under the great Seal, but otherwiſe, it may be given in evidence; A canceld Deed, (after teſtimony given of the matter of fact how it came to be canceld,) was read in evidence: Proofs by depoſition taken in the Exchequer in a former ſuit, ſhall be allowed, notwithſtanding the parties are alive: *a fortiori*, depoſitions taken in the Kings caſe, and between the ſame parties as in our caſe it is: *Kelway* 166. *Br. Records* 65. *ſtyle* 34. *Heatley* 138. *Hob.* 109. 110. *Lane* 110. *Godbolt* 439. But true it is, where the Kings Plaintiff, and the Defendant claims by Feoffment, and to prove it duly executed, deſire ſome depoſitions taken at *York*, might be allowed, the Court refuſed it, becauſe the original of the depoſitions were gone ſo, as the King muſt fight with weapons aſſigned him by his adverſary; ſo if the Plaintiff cannot find his witneſſes to give teſtimony *viva voce*, then he is, as it were, dead unto him and his depoſitions in an Engliſh Court betwixt the ſame parties, may be read to the Jury.

It is further obſervable, that in Tryals the Law allows evidence, according to the neceſſity of the ſubject matter: If the Lord diſtrain for Eſcuage, and the Tenant pleads, that he was with the King in *Scotland*, it ſhall be tried by the Certificate of the Marſhal of the Kings Hoſt: If in avoydance of an Outlawry, it is alledged he was at priſon in *Burdeaux*, it ſhall be tryed by the Certificate of the Major of *Burdeux*: The iſſue was upon full age, and two Church Books were given in evidence.

Littelt. ſect. 102. 1 *Inſtitut.* 74. *Moor* 451.

But it may be objected, That it would ſeem hard that Depoſitions taken by uſurped Authority ſhould be good. I anſwer, The ſame reaſon that warranted judicial proceedings in thoſe times to be confirmed, may allow theſe, onely the reaſon is ſtronger in our caſe, becauſe the matter of fact hath been ſo ſhifted, that the truth can appear no way:

way: To this I add, That by the Act of Settlement they are allowed; the words are these, *And whereas several of your Majesties Subjects, by whom as Instruments, the said rebels were totally subdued, dyed in the time of your Majesties absence beyond Seas, (be pleased to observe, this was in the time of the usurped Power) for supply of the then pressing necessities, and to prevent the further desolation of your Majesties Kingdom* (here necessitas vincit legem;) *Enquire into the Authors, Actors, and Abettors of the said Rebellion and War, (and this was by Offices, Examinations,* &c.) *And after much deliberation amongst themselves, and advice from others had thereupon, did dispossess such of the said* Irish *Popish Rebels of their said Lands, Tenements, and Hereditaments, as they found guilty of, and to be engaged in the said Rebellion or War, and did withall distribute and set out the said Lands,* &c. Act Settl. p. 2. Your Grace may observe in this Clause, here is the Guilt, the Proof, the Judgement, and Execution, concerning the Rebels Lands, and the date of those proceedings, is, during his Majesties absence; and yet this is laid as the Ground-work of that Clause, which vests the Lands in the King: for all the Characteristical Letters of forfeited Lands, in the fourth and fifth pages of the Act of Settlement, are, the manner and ways of seising, sequestrating, distributing, allotting, &c. of those Lands under that power: for either that way must have been observed, or otherwise, the *Irish* being a confederated Body associated by Oaths, establisht under a *Democraty*. And lastly, conquered by Arms, must, and of right might have been, according to the Law of Nations, condemned in gross; It is to be feared, the King will encounter many Deeds and Settlements, and lewd Witnesses, it is but reason he should defend himself by his own that are just: And if out of Acts of Usurped Powers, his Majesty settles the peace of his Kingdoms, it is but a part of Royal Chymistry; out of poysonous Minerals, to extract a Cordial.

Propos. 3. *That such Proclamations, or any Act of State as have declared any person or persons, and their Adherents, Rebels, before the Cessation in this Kingdom, 1643. by his Majesties Authority, shall be good Evidence in the Kings behalf, against such person or persons, to the Impeachment of their Innocency, before his Majesties Commissioners, for Execution of the Act of Settlement.*

A Proclamation is part of the Kings Prerogative, and obtains in cases of neceſſity, the force of a Law, and is therefore ſometimes termed *Lex temporis*; If the King proclaim a Tilting to be held, and one kills another in that Exerciſe, this Proclamation ſhall be good by Pleading, or Evidence, to excuſe the Felony: The King, by Proclamation, may inhibit the Subject to go out of the Realm; and if the Subject doth againſt it, it is a contempt, and he ſhall be fined; and ſince it is a Law to fine, it will be good Evidence to juſtifie it: It was no time for Sheriffs, in the ordinary courſe or Law, to make Proclamations, in order to Outlaries, when without an Army it was hazardous to march two miles from *Dublin*; His Majeſties Proclamation of the 1. *Jan.* 1641. invites them, *to lay down their Arms, and forbear all further Acts of Hoſtility*; If this Proclamation from *Mount-Geball* will not take place, that from *Mount-Gerezzin* muſt. And we never yet received an inſtance, that any embrac't thoſe offers of mercy; but though his Majeſty hung out a white Flag, they advanc't one of red. I ſhall onely add this, that it ſeems reaſonable, that if his Majeſty by name declares *J. S.* to be a Traytor, and to be proſecuted with Fire and Sword; in ſuch caſe, if any good Subject ſhould deſtroy the ſaid *J. S.* he ſhall be indempnified by the Proclamation, why then admit *J. S.* have eſcaped to this day, I ſay if no intervenient Act of Grace from his Majeſty obviate it, this Proclamation may ſorely impeach his innocency, that might have warranted me to take away his life.

11 *H.* 7. 33. a

f. n. b. c. 85. *c.*

Col. 34 Pag.

Propoſ. 4. *That where by any Order or Orders of the Houſe of Commons, ſince* 1641. *and before the firſt Seſſions of this preſent Parliament, any of their Members, upon the account of the Rebellion, have been adjudged to be rotten Members, and fit to be cut off, and have Ordered the Speaker of the ſaid Houſe to direct his Letter for the iſſuing out of Writs to ſupply their places: That ſuch Orders ſhall be allowed as good Evidence, to bar ſuch perſon or perſons of their innocency.*

It is firſt to be obſerved, this extends no further then to the Members of their own Houſe: And your Grace may remember, the Parliament ſitting ſeveral Seſſions after the Rebellion, had reaſon to enquire what became of the far greater part of the Houſe; they found many *Engliſh* mur-

murthered, the ways for travelling obstructed, for such as survived; or otherwise they were engaged in his Majesties service, for defence of this Kingdom; the *Irish* they expected after Order upon Order, with their names publikely affixt, whereupon they did conceive one or more Orders, expressing the names of such persons, who upon their own knowledge, were ingaged in the Rebellion. The House of Commons is a considerable Grand Jury, its a good *Bill vera* they return:

4 *Institut.* 23. Their Orders are Records; and that appears also by 6 *H.* 8. *c.* 16. where the words are, *viz. And the same Licence be entred on Record, in the Book of the Clerk of the Parliament appointed, or to be appointed for the Commons House*, &c. And more

Accompt of the Tryal, p. 46. directly, in the point upon the Tryal of *Harrison* the Regicide, Mr. *Jessop* was produced to attest several Orders of the Commons House, Mr. *Jessop* being Clerk of the House.

Propos. 5. *That the* English *Quarters be ascertained from time to time, until his Graces recess in* 1647. *and that all Quarters not so ascertained, be adjudged the Rebels Quarters.*

Sir, The Qualifications are the Soul and Spirit of the Act, and amongst the Qualifications, that of living and enjoying their Estates, reall and personal, in the Enemies Quarters, is *velut inter ignes Luna minores*, it is the Elixir of them; and therefore till those be ascertained, from time to time, we are as in a Labyrinth, without a Clue: It is offered to be ascertained from time to time, for the motion of War is Planetary; and there were Ebb and Spring-Tides, according to the success of the Armies. This will much expedite time, and abate the *Alamode* sin of Perjury: it will answer much the Proceedings of the Common-Law, where a Prohibition lyes, when the Bounds of Parishes are in question, when a question is,

3 *Cro.* 228. 5 *H.* 5, 10. *Heb.* 188. Whether Lands be in ancient Demeasn, it is tryed by the Books of Domesday: This is the *Shibboleth* to distinguish an *Ephraimite* from a *Gileadite*; and the Bounds of the Brook *Kidron*, warranted the Judgment against *Shimei*.

Propoſ. 6. *That where two or more perſons have claimed one and the ſame Lands, Tenements, and Hereditaments, by ſeveral Titles, that ſuch Perſons Titles be tryed and aſcertained before the ſaid Commiſſioners proceed upon the tryall of innocency of any or either of them.*

Without this, it will reſemble ſome Games at Cards, where the Proteſtant Defendant will aſſuredly have his Cards ruft upon one hand or another; for example, three, or four, or more, (for that is uſual) claim the ſame Lands; now their reſpective innocencies come firſt in tryal; if three of four be judged nocent, and one innocent, by agreement (to give it no other name) amongſt themſelves, the other Titles ſhall veſt in him, who obtaining his decree of innocency, ſhall carry the Lands, whereas *re vera*, the Title was not in him, and yet the Court (according to this unreaſonable Rule) excuſable, as to the Judgment, and the Proteſtants to the defence, who cannot have cognizance of ſuch privy and dormant Titles: This Propoſal anſwers but the Rule of enter-pleading in the Law, wherein to give one inſtance of many: Two ſeveral perſons being found Heirs to Land, by two ſeveral Offices in one County; it is doubtful
8 *E.* 4. 6. to the King, to which of them he ſhall give Livery; and therefore before Livery ſhall be made to either, they ſhall interplead, that is, formerly tryed between themſelves who is right heir.

Propoſ. 7. *That in all Claims, the Titles to the Lands, Tenements, and Hereditaments, be firſt tryed; and that the Deeds of all Nocents be left in the hands of the Court, there to remain.*

What hath been offered to the laſt Propoſal, may (in part) ſerve to evince the conveniency, if not neceſſity of this: it hath its riſe from a Maxim in our Law, *Fruſtra fit per plura, quod fieri poteſt per pauciora*; for if it appear, that the party hath no Title, the labour of Tryal
8 *Co.* 167. of innocency is ſaved, where it is probable, Witneſſes may ſtrain the Point ſo far, as to make themſelves nocent before God, to make another innocent before man; and it is but conſonant to the uſual proceedings in Law, that where it appears to the
Cro. Et 230. Court, upon the Plaintiffs own ſhewing, that he hath no Title, though the Defendants Plea may be vicious, yet he

he ſhall never have judgement. Beſides, Sir, it is to be obſerved, That the Trial of innocency is by the Act of Settlement adopted into the place of an Office found, and ſo is in nature of traverſing an Office, in which caſe the Law is clear, that none ſhall be received to traverſe the title of the King, without making a title to himſelf.

Stanford. 63, 64. 38 *E.* 3. 18.

As to that part that deſires the Writings of Nocent perſons to be left in the Courts it cannot work a prejudice to them; for the Lands being adjudged againſt them, to what purpoſe will the Writings operate in their hands: But Sir, I correct my ſelf, they will have an operation; and this puts me in minde of a plain, but appoſite ſimilitude: Sir, in the North of *Ireland*, the *Iriſh* have a cuſtom in the Winter, when milk is ſcarce, to kill the Calf, and reſerve the Skin; and ſtuffing it with ſtraw, they ſet it upon four wooden feet, which they call a *Puckan*, and the Cow will be as fond of this, as ſhe was of the living Calf, ſhe will low after it, and lick it, and give her milk down, ſo it ſtand but by her: Sir, theſe Writings will have the operation of this *Puckan*; for, wanting the Lands to which they relate, they are but Skins ſtuffed with ſtraw; yet Sir, they will low after them, lick them over and over in their thoughts, and teach their Children to read by them, inſtead of Horn-books, and if any venom be left, they will give it down upon the ſight of theſe *Puckan* Writings, and entail a memory of revenge, though the Eſtate-tail be cut off: Sir, how little ſoever this may weigh, yet in the Government of *Rome*, when the *Tarquins* were put down, not onely all moneys and Sculptures that might retain their memory, were by publique ſanctions decried, but ſuch Innocents as retained the name, were forced to aſſume new ones: The *Iſraelites* remembred the fleſh-pots of *Ægypt*, when Manna was before them; but when they wanted water, they murmured.

Propoſ. 8. *That where the Claimant claiming an Eſtate of Inheritance, hath not ſet down his title certain, in ſuch caſe, the Claimant ſhall be adjudged to claim in Fee-ſimple, and not otherwiſe.*

Sir, To open this propoſal, matter of fact muſt be thus ſtated, The Iriſh put in their claims generally under ſuch expreſſions, That he is ſeized as of a Demeaſn in Fee, or Fee-tail, or ſome other Eſtate of inheritance in uſe, poſſeſſion, or remainder: This hath been excepted

againſt, but it hath been over-ruled to be a very good form of pleading: indeed it is Sir, for one cauſe, to take away all probable means where by the Proteſtant Defendant, may maintain his Cauſe, it indangers him not onely to looſe his Land, but firſt to looſe his ſence; Thoſe Preſidents will inrich our Books of Entries, as the German word *Plunder*, did our Engliſh Dictionaries, whileſt it beggard our Nation. Beſides Sir, to demand *Oyer* of any Deeds, hath been over-ruled by the Court, ſo that when according to the preſent proceedings, We come to know the Title of the Iriſh Clymate: We have no more time of defence, then the Fowl hath, that no ſooner ſees the Fire in the pan, but dies of the ſhot in the Body.

And ſince the Law præſuppoſeth every man of full age, to know his title, what ſhall this be accounted but a ſtratagem? and thoſe fortifications are hardly tenable, when one ſtanding upon the lines of defence, may be ſhort *per derriere*, is certainly the Center of the Law; and therefore it ſayes, *Oportet ut res certa ducatur in judicium: certa eſſe debet intentio & narratio:* Unhappy was that Declaration in treſpaſs, *quare clauſum ſuum fregit & piſces ſuos cepit*, which was judged vicious for not ſhewing the number or nature of the Fiſhes, when Lands, Tenements, and Hereditaments that in the providence of the Law, are more worthy then two Fiſhes that are ſold for a farthing, may be demanded and recovered under all the incertainties and diſguiſes that may be; But the readieſt way to make *Sampſon* to grinde, is firſt to put out his eyes. *Bra. b. 2. 5 Co. 3. 21.*

Propoſ. 9. *That where any perſon or perſons, have put in his or their Claims, before the former or preſent Commiſſioners, and after put in another Claim of a different Title, the beſt Title for the King ſhall be taken.*

Sir, It is uſual for Merchants to put off an old ſtuff under a new name and here is new ſtuff put off under an old name; This by the Commiſſioners is called a *Retraxit*, and if they pleaſe to make good the word as the Law underſtands it, no exception will be taken; for a *Retraxit* is, when the Plaintiff or Demandant comes in proper perſon into the Court, where the Plea is, and ſaith, that he will not proceed any further in the ſame: now this will be a bar to the Action for ever, *Qui ſemel actionem renunciaverit, amplius repetere non poteſt*; but this *Retraxit* is much like the *Retraxit* of a Ram or Goat, that retires to make his aſſault with a doubled ſtrength; Truly 21 *E.* 4. 38. 8 *H.* 6. 8.

Sir,

Sir, We know not upon what clauſe in the Act this proceeding is warranted; The proceedings before the former Commiſſioners are allowed, true it is, that ſome Commiſſions that iſſued from them for valuation of Lands, in order to repriſal, are ſuſpended until a new valuation iſſue by the preſent Commiſſioners, and then the beſt return for the Kings Service is to be made uſe of; if it be objected, thoſe Claims were put in upon the Declaration and Inſtructions, which by the Act poſſibly may be altered; It is eaſily anſwered, either the Act hath given them a new title, or it hath not: if it hath given them a new title, then they are in by the Act, and not by any former title; if it hath given them none, then their old title is that they muſt rely on; But admit an election be, the Law is clear, and ſo reſolved, that there is no election againſt the King.

Nov. 29.

Propoſ. 10. *That no Claimant claiming by Innocency, ſhall be allowed to make any other Claim, in caſe he ſhall be adjudged Nocent.*

Sir, We muſt crave your patience to conſider this Caſe; And firſt, the Act of Settlement (omitting other diviſions,) divides the Iriſh into Innocents and Nocents, and there is but one ſubject matter, upon which, both theſe diſtinctions have their proſpects, *ſcilicet*, the recovery of their Eſtates; I ſhall grant, that election of Actions belongs to every Subject as his Birth-right; but likewiſe it muſt be granted, that where he hath made his election, proſecuted it, and determined it, he cannot have recourſe to renew his election, being not ſuſpected, but extinguiſhed; I ſpeak this with this *ſalvo* that a perſon that by particular clauſe in an Act, hath an Eſtate granted unto him, he muſt take finally and *ſub modo*, as the Act appoints, and hath no election to claim upon any former or other right; The body of the Act is but conſonant herein to the body of the Law that delights *finem imponere litibus*, and hateth all circuit of action: If a man by his Deed granteth a Rent-charge, and the Rent is arrear, it is in the Grantees election to bring a Writ of Annuity or diſtrein; but he cannot make his election but once; for if he recover in a Writ of Annuity, he ſhall never after diſtrein, or if he doth diſtrein, and avow in a Court of Record, he ſhall never after bring a Writ of Annuity, becauſe an Avowry in a Court of Record, being in the nature of an Action, is a determination of his election, before a Judgment given; *a fortiori*, after Judgment given.

Br. remitter. 49.

Litt. Sect. 219.

If

If a Wife be endowed *ex assensu patris*, and the Husband dyeth, the Wife hath election either to have her Dower at Common Law, or *ex assensu patris*; but if she bring a Writ of Dower at Common Law, and Count, albeit she recover not, yet shall she claim her Dower, *ex assensu patris*.

Dower 158.

So if the Grantee bring an Assize or the Rent, and makes his Plaint, he shall never after bring a Writ of Annuity: Nay, when an Election is given to several persons, there the first Election made by any of the parties shall stand.

10 *E.* 4. 17.
1 *Institut.* 145.

A man by his own wrong may lose his Election, as if a Feoffment be made of two Acres, the one for Life, and the other in Fee; if the Feoffee maketh a Feoffment of both, the Feoffor may enter into which of them he pleaseth, because the Feoffee hath lost his Election, 2 *Co.* 36, 37.

It is well known, that where many times in one case, the Law doth give a man several remedies, that by the folly of his Election, he may bar himself for ever, 1 *Instit.* 27. *a. b.* 279. *a.* Its at the Election of the Issue in tail, to enter, or to allow himself out of possession, and bring his *Formedon*: its at my election, if one receives my Rent, if I will charge him with a Disseizin, and allow my self out of possession, and bring an Assize, or have an Action against him. 1 *Cro.* 220. but I shall be bound up by that election, to the advantages, or disadvantages that accordingly attend it. So it is in the Claimants election, to claim by Innocency, or Nocency; but after Judgment given, he shall be concluded.

Propos. 11. *That any person claiming as an innocent, shall after proof of the title, proceed to prove himself to have been faithful, and loyal unto, and never to have acted against his Royal Majesty, or his Father, before the Defendant shall urge any Crimination, and that for defect of such proof of innocency, the Claimant shall be adjudged Nocent.*

The very letter of the Act rules this point (page 17. of the Act.) *viz. That all innocent Papists, being such as shall prove themselves to have been faithfull and loyal unto, and never acted against our Royal Father, or Our self*, &c. The Evasion, that this relates onely to innocent Papists of *Connaught*, will not hold, except by some Philosophical Rule, we may

may ascribe a particular malignity to the Climat of that Province: it is also agreeable to the rule of Law, *Actori incumbit onus Probandi*, they are the Plaintiffs, and have Estates granted to them, upon condition that they prove themselves innocent: There is an Objection, the Solution whereof will aboudantly clear this point: The Objection, is, *Stabilitur præsumptio, donec probatur in contrarium*, and therefore every of them shall by Judgment of Law be presumed innocent. I will grant this to be regularly true, but *Distinguenda sunt tempora*: when the whole Kingdom is under the serenity and calm of peace, and his Majesties Writs have their free course, every man shall be presumed to be a loyal Subject: for what appearance is there to the contrary? But, if a part of the Kingdom shall rise up in arms against their Soveraign, and assume a contradistinct Government, and in defence thereof maintain a War, and, which is worse, a cessation, with detention of his Majesties Forts, and the inheritance of his Subjects, *Nisi*—— this latter being an act of Judgement and deliberation, and this by Oath of Association, and by the strictest rules of confederacy, Who is it, that without the violation of charity and reason, can Judge all or any of them innocent, till by distinct and authentique proof, they have separated that guilt from themselves, which for so many years unto blood they espoused? Upon this construction, be pleased to heare the words of the Act, for that is the Touch-stone of pure or adulterate Expositions; *viz.*

Whereas an unnatural Insurrection did breake forth against your Majestie's Royal Father of ever Blessed memory, his Crown and Dignity, in this your Majesties Kingdom of Ireland, *upon the* 23 *of* October, *in the year of our Lord God,* 1641. *and manifest it self by the murthers and destruction of many Thousands of your said Majesties good and Loyal Subjects; which afterwards universally spreading and diffusing it self over the whole Kingdom, setled into, and became a formed, and almost Nationall Rebellion,* &c.

The case being thus truly stated, it is easy to discern both from the nature of proof, being in the affirmative; and the advantage that they are to receive by it; That they must purify themselves according to the purification of the Law, before they can be admitted to offer in the Temples of Justice: And therefore the case will be much like, as where a bargainer shall endeavour to avoid the bargain, by reason of the *non-enrollment* within six months: he must make manifest proof thereof, or else it will be presumed that it was enrolled within the six months. 4. *Co*, 20. Sir

if an innocent perſon will endeavour to avoid my preſent Eſtate, upon ſurmiſe that he was not guilty of the Rebellion (being a Roman confœderate Catholick, under which Title the War was maintained,) he muſt prove his Innocency, or elſe it ſhall be preſumed he was one of them.

A. and *B.* Tenants in common of a Mannor; *A.* purchaſeth a Frank-tenement mixt with the demeſne Lands which were not certainly known: *B.* brings a Writ *de Partitione facienda*, of the Mannor only: It was held by the Juſtices, That *A.* muſt prove the bounds of the Frank-tenement purchaſed: For the Jury ſhall be diſcharged if in conſcience they make Partition, *de tanto quanto præſumitur & dignoſcitur per præſumptiones & veriſimilia*, Dyer, 266. So, Sir, the Iriſh Claimant coming under that violent Preſumption of Nocency, if he will not prove the bounds of his actings and converſation during that War, the Jury (if there were one) or the Court as it is at preſent, are diſcharged, if they judg him nocent, if upon proof allowed unto him he cannot clear himſelf of that preſumption: I ſay [that violent preſumption] becauſe the Act caſts it upon him, and *Fortior eſt diſpoſitio legis quam hominis*: Nay, that Act to which he himſelf is a party: ſo that every Iriſh Claimant that appears in the Court, the Law ſuppoſeth him to plead thus; I confeſs the Rebellion in *Ireland* was univerſally ſpread, and became almoſt National, yet whoſoever is innocent amongſt us, and ſo can prove himſelf to be, muſt have his Eſtate without a previous repriſal, and not otherwiſe; I am an innocent. Pray Sir, admitting, that the King by no grant or engagement had diſpoſ'd of this perſons Eſtate, would you not judge that Court very complemental, that upon ſuch allegation would judg him his Eſtate without any proof; There is little of my Lord *Hobart's* zeal and indignation in that Court.

Beſides Sir, if this were an Impoſition, it is no other then what the natural Olive is ſubjected unto; Thoſe Officers that ever faithfully ſerved his Majeſty, called the 49 men, and then why ſhould the wild Olive repine? Before they can be admitted to ſtate their Arrears, they muſt prove in what Regiment, Company, Troop they ſerved, with a *continuando* during their ſervice; And nothing is more practicable. In the Barony of *Ennſhoan*, there are above two thouſand Iriſh can bring hundreds of Proteſtants to witneſs their civil demeanor, through the whole courſe of the diſtemper in this Kingdom.

Propoſ.

Propoſ. 12. *That every Claimant doth ſummon the Owner or Defendant of the Land, or upon* Affidavit *made that he or his dwelling cannot be found, the Tenant and Attorney of the Defendant, and after ſuch ſummons, notice be given of the day of hearing the ſaid Cauſe, by poſting the name of the Claimant, and Liſt of Lands in the Court 30 days before the hearing in* Leinſter, *and 40 days in any of the other Provinces, and that the Commiſſioners be deſired to publiſh the Liſts promiſed.*

A true Regulation in this particuler of Summons and Proceſs of the Court, is of great importance; errors in this, are like faults in our firſt decoction, not to be remedied: Notwithſtanding the long experience and curious obſervations of the ſettled Courts of Juſtice, in 21 *Eliz.* c. 3. which with us was Enacted 10 *Car.* c. 12. we were forced to have recourſe to a Statute for the avoiding of ſecret Summons in real Actions: Courts of Equity adhere cloſe to their Proceſs; in Courts of Law they are fitted, according to the Nature of the Actions to which they relate: And it is apparant, if this Point be not aſcertained in a different way then, as now it is uſed, many perſons will be, as ſome already have been, decreed out of their Eſtates unheard, notwithſtanding their greateſt vigilancy to defend them.

Propoſ. 13. *That the Commiſſioners obſerve to proceed in the tryall of Claims of Innocents, onely in the reſpective Counties, according to the Priority heretofore publiſhed by themſelves: And where any ſuch perſon claims in ſeverall Counties, that ſuch perſon be not heard, till the laſt County come to be adjudged, according to the forementioned order of Priority wherein he is concerned.*

That there be a Priority of Counties, and that Priority poſitively to be obſerved, is of abſolute neceſſity: It were very hard (dividing this Kingdom into thirty three Counties) to give them all the alarm at once, and to continue them on that duty, when but one quarter is attaqued; we ſhall out-bid the Winds uncertainty by a point, that ever wandring within 32 points. Every man comes with the Spirit of a Gameſter, fairly confident to win, that is, to have his buſineſs ſpeedily heard; the Engliſh are ſerved with Proceſs, who muſt appear, both Plaintiff and Defendant are drawn up, with their troops of Witneſſes (a ſort of Mi-

ſhia that muſt not run in arrears) always ready to fight, but uncertain when the Court will give the ſignal: it will be charge and expence enough to both parties, when it is confined to a particular County, but without Priority the charge will encreaſe in proportion, as 1. is to 33.

As to the ſecond part, to *poſt-pone*, the trial of the claim out in ſeverall Counties, to the time of the trial deſigned for the laſt County: This will be a ſole expedient to prevent ſurprizes in hearing (no ſmall fate to the Engliſh Defendant) and of no prejudice to the Iriſh Claimant; or if ſo, it were *de minimis*, which, in ſo comprehenſive a Settlement is not regarded: For example, If a man have but three Acres in the County of *Dublin*, and a thouſand pound *per annum* in the County of *B.* as much more in the County of *C.* which is ſet forth to ſeveral Adventurers and Souldiers, when this priority of Counties, and poſt-poning of trial to the laſt County is eſtabliſht and publiſht, all the Defendants are ſecure, untill the tryal of the laſt County comes, and then the ſeveral three Counties make an united defence; whereas otherwiſe, if he ſlip into his tryal for his three Acres in the County of *Dublin*, and by a faint defence or otherwiſe, be be adjudged innocent, it is likely that Decree of once innocent, ſhall be always innocent as to recover the remainder of his Eſtate in the other Counties, that never had notice of his Tryal.

Next, it were manifeſt injury to the King, where the tryall may be, when the firſt County, or laſt County, comes upon the Stage, to take away the right of Election from his Majeſtie, ſpecially accompanied with a palpable loſs and diſadvantage: It is yet the character of two great Generals, That one *cunctando*, by delaying, recovered the loſt eſtate of the people; The other *Celerando*, by precipitation, loſt what was in poſſeſſion.

Propoſ. 14. *That matter of fact cognizable by the Court of Claims, be tryed by Jurors.*

We do not well underſtand, how by the Act any other way of tryall is allowed; for in ſome caſes, leſt there might be a miſtake of what proof is intended, it is particularly ſet down by Juries: Next, this Tryal by Juries, is the ancient way and birth-right of the people, *State ſuper vias antiquas*: And though this Act had Enacted a tryal otherwiſe, and

and onely in the affirmative, it would not have excluded or barred this ancient way of tryall by the Common Law, and which was before the Conquest (*Lamb. verbo. Centur.*) Besides, in the clear uncontroverted construction of the Law, that, Whereſoever a Statute mentions the word *Proof*, the Law intends it of no other manner of proof whatſoever, then that by Jury. The Court of Chancery, how often doth it recommend iſſues to the tryal of the Common Law Courts by Jury. Matter of Law, and matter of fact are divided: to the firſt, the Judges anſwer; to the laſt the Jurors. Upon any wrong done by the Court, there lies remedy by Error for the Subject; if by the Jurors, then by attaint; but as now the execution of this great Act ſtands, admit the Court being Judges both of the Law and Fact, will decree away my Eſtate, Where is my remedy? The higheſt Court of equity allows a Review: *Hob.* 292, 293. reſolved by the Judges, That to try cauſes that were naturally triable by the Common Law, and by the Jury, by a Chancery way, would ſuddenly confound all Juriſdictions; make all the Common Law, and all the courſe of it, needleſs, and a handmaid to the Chancery. It is further conſiderable, that this will certainly bring great prejudice to his Majeſties intereſt: for Jurors may finde many things, that the Court will not, or is not bound to take notice of, the finding whereof may veſt the Eſtate in the King: A verdict may finde matter of Record, which was never given in evidence; and ſo likewiſe matters of writings, and other things, not within the pleadings, or ever given in evidence; and nothing, can more contribute to the juſt diſcovery of men, and their demeanors in theſe troubleſome times, than by the knowledge of their neighbours, *Vicini vicinorum facta præſumuntur ſcire:* And there is no reaſon that the Engliſh Intereſt having but one eye left them, as to this point of diſcovery, and that not yet recovered from the bloudſhed, ſhould have that put out: Sir, if no other reaſon moved, this would induce us, Leſt we caſt a diſrepute upon our ancint and known Laws, that make this Iſland a *Terra firma*, as if theſe ancient Courts were only Pleaſure-boats in fair weather, and could not ride it out in a ſtorm: Sir, if we ſettle the Kingdom by any other means, than by the experienced rules of thoſe Lawes, we may haſtily bring our wounds to healing and skinning, whileſt a *ſanies*, and corruption lyes at the bottom, which will break forth more incurable than at firſt.

Propos. 15. *That no person shall be admitted to prove his Innocency by any other Witnesses, then such as have constantly lived in the English Quarters.*

We must with your Grace's favour consider the issue again, (*viz.*) Guilty or not Guilty of the Rebellion in *Ireland*; if so, no person that is *Particeps criminis*, that is under the same guilt, ought to be admitted a witness against the King to prove the person upon his Tryal innocent, *Facinus quos inquinat, æquat*: If a person be *infamous*, if he be attainted of a false verdict, or conspiracy at the suit of the King, or convicted of perjury or of felony, whereby they became *infamous*, or regularly he that loseth *Liberam legem*, cannot be a witness; now if your Grace consider what hath been hinted formerly, how the Rebellion in *Ireland* was maintained and owned by confœderacy, association, by their representatives in the General Assembly; that were *Homines generici*, as Divines term *Adam*, when by his fall his posterity fell: If your Grace reflect upon the spreading consequences of it, that as it was voted by power, and trust sent from all the Counties, Cities, and Burroughs, within their power, so it was tragically acted in every part of this Kingdom; And lastly, if your Grace cast your eye upon the mark, and level in this case, the Act of Settlement, which upon these and other considerations, have called it universal, and almost National: it would seem but very just that such crimes should not be purged by persons guilty of the same, which all under that confœderacy by the Judgment of Law and that Act, are; These persons have by their own industry lost *Liberam legem*, their Estates are forfeited as well as if it were by Office or attainder. For What? It is answered Upon the account of the Rebellion: then certainly the witness must be *Rectus in curia*, before he can make another so; for *Quicquid efficit tale, est magis tale*: in a *modus decimandi*, against one, the rest of the Parishioners shall not be witnesses; in defence of Common against a Commoner, the rest shall not be witnesses, *Hob.* 92. And yet the union and tie in these cases, are not under such strict interest of association, as amongst the confœderate Catholiques of *Ireland*.

It may be objected, We make use of them against themselves: It is easily answered, It is but just and reasonable: A Tarryer is the only creature to unkennel a Fox, because he is got by a Fox and a Brache hound; How is it possible for us to prove such a person to have been at such a battel, to have contributed to their assistance, to have sat in their General Assemblies,

ſemblies, but by perſons frequent amongſt them, and of their own confœderacy, and ſuch a Witneſs is in Law a double Witneſs, and the ſame reaſon urgeth the neceſſity of their proof by ſuch as lived in our Quarters: Beſides, it is known how the Law is, in caſe of an Approver, who though he confeſs the ſame Felony, *Stamf.* pl. Cor. fol. 142. Who either by direction of the Court, or at the prayer of the Felon himſelf, is examined by the Coroner, and his examinations taken upon Record for the good of the King and Commonwealth. And Sir, I ſuppoſe the Opinion is maintainable, (eſpecially as the proceedings are,) if he or they that were in arms in *Munſter*, are not equally guilty of the bloud ſhed by the Army in *Ulſter*: they move by joynt Counſels, from one publick ſtock of maintenance, the victory of one is the victory of the other, and conſequently the bloud ſhed by one, is the bloud ſhed by the other: It is good Law, that if a man received a man that is attainted of Felony by Outlary in the ſame County, though he be ignorant of it, yet he is acceſſary to the Felony, becauſe the Outlawry is matter of Record, of whſch every one ought to take notice; This were *durus ſermo*, a hard Law, if when an open and univerſal Rebellion is maintained, and the Kings Colours flying in the field, and the Sword, and other Enſigns of Royalty at home, (as notable matters of Record, as an Outlawry upon Proclamations in the County-Court,) that perſons ſhould not take notice of it, and then taking notice of it, ſhould relieve and abet the actors therein, and inſtead of being puniſhed as acceſſaries, they ſhall triumph, as witneſſes to clear the principals, (if any acceſſaries, were in Treaſon,) The reaſon of the Law why if 3. or 4. be in a room, and but one gives the deadly ſtroke, yet the other ſhall be acceſſaries, is, becauſe the preſence of the reſt abated the courage of him that was killsd to make his own defence: upon the ſame reaſon, all the confœderate Catholiques are acceſſaries or principals.

If it had been underſtood by the Proteſtants in *Ulſter*, that this Rebellion had been only the attempt of Sir *Philome*, or a Rabble, as in publick papers the Iriſh have termed it, ſo much bloud had not been ſo cheaply ſpilt: but hearing it was univerſall, and countenanc't by confœderacie of all; that his Majeſties Proclamations to lay down armes were contemned, this abated their ſpirits, and made way for diſpair to dethrone reſolution.

Propos. 16. *That when the Court doth give Judgment upon any cause, that every respective Commissioner seriatim, deliver his particular Judgment in open Court, with the reasons thereof.*

Sir, It is among the ornaments of our Laws, that matters are very learnedly debated at the Bar, and in Causes of difficulty solemnly argued by the Judges on the Bench: In every leaf of our Year-Books and Modern Reports, we may discern the Judges Opinions and their Reasons. No doubt but Judicatures are under great temptations, and a greater check cannot be upon the frailty of our Natures, that they lie not under the protection of accountedness: As true it is, that virtue hath been scandalized by an affinity with vice, so likewise it is true, that vice gets a reputation by a commerce with virtue: That *Cato* did look on, was held to be a restraint to some spirits; and no doubt but when so great an audience as attends that Court, shall hear every particular Commissioners Judgment, and the reasons of it, whether it may prove as a means of caution to themselves, yet surely it will give a great satisfaction to the persons concerned, upon whose unbiassed Judgments they may repose as well as upon their Councels Arguments. Thus it was in the case of Ship-money. And such is the solemnity of Judgments, that they are entred *Consideratum est per Curiam*; if it be entred *Videtur Curiæ*, for the levity of it error will reverse it.

Propos. 17. *That where a Affidavit shall be made, that any material Witnesses being summoned before the Court, refuse or neglect to come in, that such cause be suspended.*

This Proposal is the issue of Experience: for we are certainly informed, that divers persons who have formerly offered themselves as witnesses, and that have declared their knowledg in order to prove the nocency of several persons, withdraw themselves: some alledge, they are under the censures of Excommunications, and Fulminations, (they are hard words, but happily your Grace remembers them, when not only your Grace, but such as should give your Grace any relief, or those that served under your Command, have been involved in the same, and perchance your Grace hath not forgot the operation of them). It is said in Philosophy, *Actus activorum non sunt nisi in patiente bene prædisposito*. How receptive the complexion of the people hath been of such influences,

fluences, I ſhall paſs by; onely thus much I muſt obſerve, if they were ſo powerful as to violate the Bonds of Allegiance, to their lawful and merciful Soveraign, they may without ſtraining, diſſolve the Reciprocations of Common Equity amongſt Subjects: Eſtates reſt upon Proofs, and if Witneſſes neither *flectuntur prece aut pretio*, I mean their neceſſary and convenient expences tendred: we muſt reſort to the Law for its proceſs; If they will not mannage with a Snaffle, perchance their Heads may be brought into a Rane with a Port-pit: And, upon *Affedavit* made, it is but reaſonable to ſuſpend the Cauſe: There is no priviledge in this caſe by Law, to exempt them for giving Evidence in his Majeſties behalf, and for ſettlement of this Kingdom, which is the adæquate Object of the Act: There are no ſtronger or nearer Relations then Man and Wife, that the Law (in many reſpects) eſteems them as an *Individuum*: Yet a Wife, for the King, may be brought to give Evidence againſt her own Husband: *Privilegium non valet contra rempublicam*: A Maſter of a Ship, laden with Merchants Goods, may caſt them over-boord; but if he be laden with Ammunition, Ordinance, *&c.* of the Kings, to relieve his Army or Garriſon, he cannot juſtifie to fling them over-board, though the Veſſel and Mariners lives are at the ſtake, (*Bacons ma.* pag. 17.) But is not the ſettlement of the Kingdom of more worth, (and that depends upon the faithfull diſcharge of Evidence) then a particular Garriſon.

Propoſ. 18. *That where any perſon or perſons provided for, to be reſtored by particular name to any Eſtate, that ſuch perſon or perſons ſhall not be admitted to claim the ſame, under, or by any other way or means, then is laid down in ſuch Clauſe in the ſaid Act, wherein he or they are ſo particularly named.*

May it pleaſe your Grace, this humble Propoſal is one of the Poles, upon which the Act of Settlement moves; and it hath its particular aſpect upon the Clauſe, in *page* 21. of the Act, in which ſeveral perſons are particularly named; and afterwards it is ſaid thus, *viz.*

We do hereby declare, That they and every of them, without being put to any further Proof, ſhall be reſtored to their former Eſtates according to the Rules and Directions, in the laſt fore-going Clauſe of this Our Declaration, concerning ſuch as continued with Us, or ſerved faithfully under Our Enſigns beyond the Seas. Now Sir, we have conſidered that fore-going Clauſe, *VIZ. That ſuch perſons ſhall be reſtored to their former eſtate, a Reprize being firſt aſſigned, and legally ſet out of the remaining forfeited*

Lands undisposed of, to such Adventurer or Souldier, or other person before named, of equal value, worth, and purchase to the Estate, out of which such Adventurer or Souldier, or other person aforesaid, shall be so removed. So that it appears clearly, none of these persons are intended by the Act to be restored without a *previous* Reprisal first set out: And they are, as to the manner of their Restitution, placed in the Catalogue of those that served beyond Seas under his Majesties Ensigns.

Though nothing can be clearer, yet Sir, be pleased to observe, how in order to the Design of this Clause, several other Clauses in the Act are particularly framed for the execution of it. In *page* 26 of the *Declaration*, where the Rules of Precedencies in restitution were set down, they are included in the provision made for such as served abroad, &c. or otherwise they were totally left out: But it was but reasonable, since their manner of Restitution was limited, according to the restitution of those that served abroad, that they should be included with them, and it had been meer surplusage to have mentioned them.

Now Sir, to proceed, in *page* 37. of the Act, there is a particular Clause for the further making the former Clause practicable, *viz. In the next place, you are to take care, that the Adventurers, Souldiers, or other persons, possessed of any of the Estate or Estates of such persons, to whom We have by our said Declaration assigned a particular favour, and are in a distinct branch thereof by Name expressed, be Reprised, as in our said Declaration is expressed, and the said persons restored to their former Estates, from the time that such Adventurers or Souldiers shall be so Reprised.*

And be pleased Sir to observe, least this intimation might not be directory enough, it concludes, *observing always the former cautions and provisions in our said Declaration expressed*, referring to the said persons restoration: that is, (*pag.* 20.) *A previous Reprisal being first set out.* One might think here were a particular Act of Parliament from themselves, ascertaining under what terms they were to enjoy their Estates. But in the perclose of the whole Act, *pag.* 118, 119. *Provided also, and be it further Enacted by the Authority aforesaid, That in case Reprisals shall fall short, whereby persons mentioned and appointed in the said Declaration and this Act, to be restored, without being put to any further proof.* This is the Character (that denotes the same persons, cannot or shall not obtain or receive the full benefit intended them) Sir, be pleased to observe, there was no other benefit intended them, *then it shall and may be lawful for the Lord Lieutenant, or other chief Governour or Governours, and Council, for the time being, and they are hereby authorised*

authorised to order, appoint, and make distribution amongst them, of the said satisfaction or restitution allotted them, in such proportion and method as they shall judge most equal and just consideration being had, of the conditions and pretences of the several persons concerned: Nevertheless, according to the Rules and Directions of the Declaration concerning them in all other Points, and particularly of that of Praevius Repriſe or Repriſal, which Order and appointment of theirs shall be final, and observed by the Commiſſioners appointed, or to be appointed for the execution of this Act; any thing therein contained to the contrary in any wise notwithstanding. Thus Sir, your Grace ſees how the Intereſt of theſe perſons ſo named, is fenced and bounded throughout the Act; ſo that indeed, the final determination of their Intereſt cannot be adjudged, no, nor the Intereſt of any one of them aſcertained, till the value of Repriſals appear before your Grace and Council, and then your Order ſhall be final, and directive to the Commiſſioners: And it cloſeth home with *Any thing contained to the contrary notwithſtanding.*

Now though this be ſo, they are beginning to leap over the hedge, and putting in the ſtrongeſt fore-maſt, and wave all theſe Clauſes, and put in their Claims upon the account of Innocency, upon which, they had once an election to have relyed upon, but now it is determined by this Clauſe: The reaſon that induceth them is plain; for if they ſhould be judged Innocents, then they are reſtored without any conſideration of Repriſal: If they be judged nocent, then they will keep this Clauſe for a Retreat.

But Sir, I am commanded by the Houſe of Commons, humbly to offer your Grace their Opinion, that this is contrary to the whole courſe and reaſon of Law in the general, and very illuſory to the main Deſign of the Act; and in the opening this Point, I have command to be an humble Suitor to your Grace for your patience, his Majeſties Intereſt as to his Revenue, and the Proteſtants Intereſt, being ſo highly concerned.

1. Sir, We preſume it will be allowed, That an Act of Parliament binds all perſons, for all perſons are parties to it, 21 *H.* 7. 4. nay, my Lord *Cook*, *Inſtitut.* 4. *p.* 4. tells us, that multitudes are bound by an Act of Parliament, which are not parties to the Elections of the Knights, Citizens, and Burgeſſes, as all that have no Freehold.

2. Freeholders in ancient Demeaſn.

3. All Women, having Freehold, or no Freehold.

4. Men within age, &c. A *fortiori*, then thoſe are bound by this Act, to

which they themſelves in perſon have given their aſſent. Now Sir, as to the point in hand, (*viz. That the perſons that are by peculiar name reſtored to their Eſtates, under a* prævious *Repriſal, can claim them no other way then the Act preſcribes.*) I ſhall humbly offer you the Judgment of the Sages of the Law in an inſtance or two: Where a man hath Title to Land by an Eſtate-tail; and afterwards the ſame Land is given to him by Parliament, his Heir ſhall not be remitted, for by the Act of Parliament all other Titles are for ever excluded; for this is a Judgement of Parliament, that the Eſtate ſhall onely remain in the ſame very way that it is given: The ſame Law is, where the King hath a Title in Tail, and the Land is given to him by Parliament in Fee; the Eſtate-tail is determined, ſo that the Heir ſhall not avoid the Leaſes made by his Father; for the Statute binds all for Titles and Eſtates, *B. Parliam.* 73. The Reaſon given here, is, for that it is a Judgment in Parliament; and of what extenſive power that is, even to take the right hand of an Act, 2 *Inſtitut.* 497. will inſtance.

Nay Sir, the operation of a Statute caſts it with that violence upon the party taking it, that if it had given me the Eſtate of any particular perſon by name, ſaving the right of that party, the ſaving had been flattering (as we call it) 1 *Co.* 47. *a. b.* It is ſaid, Though the Act be in nature of a Conveyance or Judgment, the ſaving is repugnant, as to him that makes the Conveyance, or againſt whom the Judgement is given, or from whom the Eſtate of the Land is to paſs; for though they be parties to the Act, yet in Judgement of Law, the Land ſhall move from him that is ſeized, (*Plowden* 49.) it is there held, where Lands are given by Statute, it ſhall be interpreted the gift of the Ter-Tenant, and the confirmation of all others that aſſent to the Act; for if it ſhould be adjudged the gift of another perſon, the Parliament ſhould do wrong to the Ter-Tenant, to take away the Land, and make another to give it.

Sir, The application is eaſie and familiar to your Grace, who well remembers the great Solicitations that was made to get into this Clauſe; it was look't on as the *Ark*, for thoſe who could not endure the *Examen* of *Innocency*; and being *nocent*, found themſelves bound by the Act, to be concluded, by taking out of Lands in *CONNAUGHT*, in compenſation of their former Eſtates; they very well underſtood, that the Gate of *Innocency* had no flaming Sword over it, to keep any from entring. As great and powerful Proviſions are made for ſuch perſons, as Wiſdom could contrive; but the Law preſuppoſeth, every man knowing

OWN

own Estate and condition best, will not make an election to his prejudice; but if he do, and that election is executed by an Act of Parliament, he is bound for ever, *Hob.* 256. it is thus.

Note, an Act of Parliament hath every mans consent, as well present as to come, and he may be an Authour of his own hurt; also he must hold as the Act gives it, having power to bind every mans right, finally or *Sub modo*; and therefore if any person by his application to the King, when out of his Princely favour, hath granted his Request, though thereby he hath re-intrencht himself of a provision otherwise held out unto him, he must lay his hand upon his mouth, and own the inconvenience to arise from himself; It hath been judged, that License for alienation by Parliament, takes away the Fine, otherwise by Law due to the King: The like in case of partition by Parliament between the Co-heirs of the Lord *Latimer*, 1 *Le. pl.* 113. the reason is given there, for that the Queen her self is party and principal Agent, and therefore against her own Act, she shall not claim the Fine; And shall an Act attach the Revenues of the Crown, that *are firmamentum belli, & ornamentum pacis*, and yet a private person avoid, and make illusions a Statute, for which himself hath been a suiter; and to which, upon the passing of it, he hath personally given his vote: *Ecce modo mirum*——

Sir, Nothing is more favoured by our Law then a Remitter, and even that upon construction of the Stat. 27 *H.* 8. that ancient priviledge of the Common Law is so over-ruled, that the person taking by the Statute, in most cases, shall not be remitted: and if a Statute by construction, layes aside the indulgence of the Common Law in publick settlements *a fortiori*, it will bind private Interests particularly expreſt.

In the next place, I must observe, That all the clauses relating to these particular persons, though they are in the affirmative, yet being directory, as to the form and manner of their restauration, *viz.* That they shall be restored from the time that such Adventurers or Souldiers shall be reprized, *&c.* and *viz.* observing always the further cautions and provisions in our said Declaration expreſſed, reserving to the said persons restauration (*pag.* 38. 12. 19. *Act*) they carry in them a negative; for it is a Rule, That all Statutes that limit a manner and form in execution of matters that were not so by the Rules of the Common Law, though they be in the affirmative, they are in substance the negative, as if it had been expreſt, That it shall be done in the manner and form, and no otherwise; so it hath been adjudged upon *West.* 2. *c.* 4. that gives,

Quod

Quod si deforceat, and that the Demandants may *Vocare ad warrantum eos si essent tenentes*, that is as much as if it had said, *Et nulla alia modo*, and so 11 *H.*7. *c.*20. where it is said, he shall enter, enjoy, and possess the Land, according to his title in them, it shall be understood, according to his title, and in no other manner, *Plowd.* 113. Now to restore an Nocent, that is, one guilty of Rebellion, to his former estate, certainly will be granted, it is not agreeable to Common Law, why then when this Act particularly names some of them, and that under the character of Nocent persons, and presents the way, order and means of their restauration, not once, but through the texture of the whole Act, it must needs rationally follow, that it is intended, and no other way. The Act saith, *You shall observe the Rules for their restauration*, what is the Rule? it is this, after a *previous* reprisal; but if you take him out of this clause, and put him upon Innocency, then he is to be restored before a reprisal: I humbly ask, How is the Act answered, that sayes, Thus it shall be: No, saith the Court, it shall be thus: And by saying so, a great part of the Act is made to signifie nothing (nay, that part of the Act upon which the Protestants Interest wholly depends, for that being observed, they are sure to have their penny, or pennyworth, the Estates they now enjoy, or reprisals, which by the plain and genuine construction, preserves all the part of the Act in symmetry and proportion; and I am sure this was the Judgement of the House, upon passing the Act: I shall shut up this point, with that which should have had the preference, even the consideration of his Majesties Revenue; if the persons be held to the clause of their own Election, they are to pay the same Rents the Adventurers and Souldiers pay, by the Acre; if otherwise, their former Rents, which are not considerable. We know upon whose account it is, that his Majesty is at that great charge to maintain an Army here, it is but reasonable a round share of the charge should lie on them; whilest the greatest Estates of the Irish in this Kingdom, that are rationally qualified by this Act, if they escape it, the Protestants do bear the burthen, and they scarce touch it with their little finger.

Propos. 19. *That the Officers before 49 and their Tenants, shall be admitted Witnesses to give evidence for his Majesty in any causes whatsoever depending before the Court of Claims.*

Sir, We must remember again the Tryal, (*viz.*) Guilty or not Guilty, between the King and the party, and that in matter of Treason, which premised

premised, I might say no more, to examine the sufficiency of any of his Majesties Subjects, to give Evidence upon such a Trial: I shall admit, that regularly no man shall be Witness in his own cause: but this is to be understood *valde grandibus*; It is said in our Law, *Judicia affectum non habent, tantum temporis quærere, quibus tempus, tutus erit*; I have hinted before how difficult it is for proof to be made, after so long a tract of time spent in War, and in confusion, since upon his Majesties happy Restoration. The Act, saith the Witnesses, have been slain, and those few, the Officers serving before 49. whom Providence reserved, when God impannel a Jury to enquire after blood, must be challenged: The ways by which Evidence might have been had, hath been by the power of the Sword drawn against, the Law been obstructed; and therefore it may be, I to such guilty persons Exceptions. *Frustra qui in tanto peccato a lege petit auxilium.* Were an unlawful Assembly, at this day, in a riotous Posture, the Justices and Sheriffs, with the power of the County, might resort to the place, and view the force, and record it; but this was too dangerous an imployment for them, when an Army of Horse and Foot could not undertake it without hazard: and if few or no other Witnesses are left, it were to impose too much irrationality on our Law, that by the Rules of it Treason might pass with impunity: to prevent which, the Law hath recourse, in extraordinary cases, to extraordinary means: It is a Maxim, *Quod remedio destituitur ipsa re valet si culpa absit*: and therefore the Law will allow an *Avowry* without *Attornment*, where he hath no means to compel the Tert to attorn, 6 *Co.* 68. *a.* so where Impediments happen by the Act of God, the Law judges according to the necessity. If one be bound to repair a Bank of the Sea, if he (by negligence) suffer the Waters to surround his Neighbours ground, he is lyable to wast; but if by violence of Tempest, an Innundation happen, he is excusable. If the Heir at full age tender Livery, and dyeth before he hath made homage, the Law gives him the advantage of his Tender in the same way, as if it had been accompanyed with all the solemn Circumstancies attending it: If a Disseisor die seized, the Disseisee being in Prison, or beyond the Seas, it is no discent, *Finch* Nom. 17. *Necessitas vincit communem legem*: and therefore, if two Joynt-Tenants be of Land, and to the Heirs of one of them, they shall not joyn in a Writ of Right and yet they shall joyn in a Writ of Right of an Advowson: For if they shall not joyn, neither the one nor the other hath any remedy, 5 *Co.* 10. *b.* *Illud quod alias licitum non est ex necessitate fit licitum & necessitas inducit privilegium quod jure privatur*. And upon this ground was the

Bishop

Bishop of *Salisburies* Case judged of the grant of an Office, with an Annuity contrary to the Statute, 1 *Eliz.*

But Sir, was there ever greater necessity, is not the settlement of the Kingdom in its critical hower, is not the Banes publisht, Now to give evidence, or for ever after hold our peace? Do not nocent persons pass in triumphant innocency, whileſt those stand by, whose evidence, if admitted, would write the Letter of Condemnation on their fore-heads? These were the men that broke through the Hoast to draw water, to get evidence, by marching into the enemies quarters daily encountring them, and now the water must be spilt on the ground, and they denied to say, they ever did see them: This is worse then to muzzel the mouth of the Oxe, whileſt he treads out the straw; Persons in many cases may be examined, where the consequence may be to obviate a penalty, they may be subjected unto; A Sheriff may be examined upon his own return. A forraign Plea may be sworn; An Infant levies a Fine, and brings a Writ of Error to reverse it, yet he may be examined; Debt upon arrerages of accompt, the Plaintiff may be sworn if there be any such accompt, and by this he takes away the benefit of the Defendant to wage the Law: The party rob'd upon the Statute of *Hue and Cry* shall be examined, and so upon a forcible entry, though the party may have restitution, yet he may be examined; In a Writ of Entry brought, an Essoin was cast for the Defendant in the Kings Service, *in partibus transmarinis*, and the Essoiner was examined and sworn *de veritate essoine*, Dyer 154.

I might proceed, that *licet iniquum est aliquem suæ rei esse judicem*, yet in some cases one may be judge, Master and Carver: *Lessor* Covenants to repair the House, if he do not, and the Lessee doth it, he may pay himself out of the Rent, 12 *H.* 8. 11. Taylors and Hostlers may detain the Garment and Horse, till reasonable satisfaction be made.

It may be added, how little those Officers serving his Majesty before 49. are subjected to those temptations, upon which the Law in its rigour grounds it self, to exclude interested persons from being Witnesses; The bulk of that remote possibility of satisfaction, is but gleanings and fragments, (their reward is, that they know his Majesty hath an esteem of their services and sufferings,) joyn that with the worth of the persons, being all Commissioned Officers, and then who could without injury to the Law of charity judge them, that to preserve those Oaths of Allegiance & Supremacy they have sworn inviolably, have put no rate upon their lives and fortunes, and have not worshipt the Idols of the times, though the

Oven

Oven was seven times heated, I say, Who can judge, nay think, that for an acre of Land to be divided among them, they would stoop to so sordid a crime as Perjury: The Peers of the Realm, upon this account, pass upon tryals of blood, only declaring their Judgments upon their Honour: But surely our case is plain, and that they are not only lawful Witnesses, but under strong Obligations, if any person be indicted of Treason, to give in evidence, their knowledg in matter of fact, Tenant for life, and the Remainder over: If Tenant for life be indicted for Treason, he in the Remainder may be a witness, though in that case, when one goes to the bough, the other goes to the plough.

Propos. 20. *Upon motion to the Court, that any aged or impotent Person that can give evidence for his Majesty, That their depositions be taken by Commission, and lodged in the Court, to be produc't in his Majesties behalf, as the same shall require.*

This is not denyed in the case of the Subject; Commissioners to examine, *in perpetuam rei memoriam*, are frequent; It is but reason to use all good Husbandry for the King, and to pickle up such proofs, as through age cannot keep long.

Thus may it please your Grace, I have past by those several heads given me in charge by the House, humbly to present to your Grace, with the instance of some of those many reasons they had under their consideration; The conclusion of the Instrument is this, *viz.* These are the particulars which are presented to his Grace and Council, as the result of the observations which have been hitherto made upon the late proceedings; And that this House humbly desires his Grace, that when time and experience shall suggest any thing of like moment with the above particulars, his Grace and Council will be pleased to receive them: And if any thing herein offered, through the straitness of time, be not sufficiently cleared, his Grace and Council would be pleased to admit a Committee of the House of Commons, to confer with a Committee of the Board upon the same; and that, in the interim, if any cause to be heard by the Commissioners, may receive prejudice under any of these Proposals, being undetermined, that the Commissioners being ascertained of the same, may suspend the hearing of it, till his Grace and Councils pleasure be further known.

It rests only to beg your Graces pardon, if in discharging the trust reposed in me, I have been enforced to use some words of Discrimination; It is against the Inclination, nay, the Prayers of the House (if the Subject matter could dispence with it) to avoid them: They know, the compleat peace of the Kingdom, rests not in cessation of Arms, but in union of Hearts; and they doubt not, but under the prudent Administration of his Majesties Authority vested in your Grace, we shall arrive to that happiness, that it may be said, *Tam civili gens una fumus*; ah Sir, and *Sic fumus in ævum*: We complain not of the want of a good Law, for the settlement of this Nation upon sure and lasting foundations, such that nothing but our sins can subvert: If the spirits of all Kings living had been extracted, they could not have contributed more to revive a gasping Kingdom, than the wisdom of our Royal Soveraign, blest with a Divine assistance, hath in this Act of Settlement recorded, to perfume and embalm his memory to all ages: But Sir, *Corruptio optimi est pessima*: It is not the Sword, but the hand that gives Protection, or a Wound, with respect to the efficient cause: The Law saith, All-hail-Protestants of *Ireland*; but if the execution be dissonant, we are crucified under a glorious Inscription of Mockery.

The execution of the Law, is the soul of the Law; the want of this hath transmitted this never-dying Truth to Posterity, That *Nulla est tam misera servitus, quam ubi jus est incertum & vagum.*

FINIS.

February 13. 1662.

ORdered by the Houſe *nemine contradicente*, That Mr. Speaker having this day ſo faithfully delivered the ſenſe of this Houſe, unto his Grace the Lord Lieutenant: Do cauſe his Speech to be Printed and Publiſhed, and that it be entred into the Journal of this Houſe.

Philip Fernely,
Cler. Parl.

I *Do appoint Alderman* William Bladen *to Print my Speech: And that none elſe preſume to Print it without my Order.*

AUDLEY MERVYN.